Aida Ratini bt Mansor (trading under the name and style of AR Lahore Enterprise) & Anor v Sungei Wang Plaza Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO WA-12ANCVC-24–01 OF 2023
LEONG WAI HONG JC
29 AUGUST 2023

Landlord and Tenant — Distress — Writ of distress — Whether landlord could apply for ex parte writ of distress for an increased rent not agreed to by tenant — Whether landlord in ex parte writ of distress could apply for court order to lock up tenant's premises — Distress Act 1951 ss 5 & 7 — Rules of Court 2012 O 75 r 3

The present appeal involved the dispute between landlord and tenant. The respondents in the present appeal were the landlord whilst the first appellant was the tenant. The respondents had unilaterally increased the rent of the premises from RM30,000 to RM69,026.46 per month and consequently, the first appellant failed to pay the rent to the respondents. The respondents then successfully obtained an ex parte distress order and an order to lock the premises. The appellants had applied to set aside the distress order, but the application was dismissed by the sessions court, hence, the present appeal. The questions to be determined by the court were: (a) whether a landlord could apply for an ex parte writ of distress for an increased rent not agreed to by a tenant; and (b) whether a landlord in an ex parte writ of distress could apply for a court order to lock up the tenant's premises.

Held, allowing the appeal with costs to be paid by the respondents amounting to RM10,000 here and below subject to allocatur, and setting aside the order of the sessions court:

(1) A landlord could not apply for an ex parte writ of distress for an increased rent not agreed to by a tenant. If a landlord raised the rent and the tenant declined to agree, the only remedy available to the landlord was, after giving the tenant a proper notice to quit, to sue him for vacant possession but he had no right to distrain for his increased rent (see paras 8–9).

(2) A landlord in an ex parte writ of distress could not apply for a court order to lock up the tenant's premises. Such a right was not provided under ss 5 and 7 of the Distress Act 1951. It was also not provided for under Form 186 of O 75 r 3 of the Rules of Court 2012 (see paras 11–12).

[Bahasa Malaysia summary

Rayuan semasa melibatkan pertikaian antara tuan tanah dan penyewa. Responden-responden dalam rayuan ini adalah tuan tanah manakala perayu pertama adalah penyewa. Responden-responden telah menaikkan sewa premis secara unilateral daripada RM30,000 kepada RM69,026.46 sebulan dan akibatnya, perayu pertama gagal membayar sewa kepada responden-responden. Responden-responden kemudiannya berjaya mendapatkan perintah distres ex parte dan perintah untuk mengunci premis. Perayu-perayu telah memohon untuk mengenepikan perintah distress tersebut, tetapi permohonan tersebut ditolak oleh mahkamah sesyen, justeru, rayuan semasa. Persoalan-persoalan yang perlu ditentukan oleh mahkamah ialah: (a) sama ada tuan tanah boleh memohon writ distres ex parte untuk kenaikan sewa yang tidak dipersetujui oleh penyewa; dan (b) sama ada seorang tuan tanah dalam writ distres ex parte boleh memohon perintah mahkamah untuk mengunci premis penyewa.

Diputuskan, membenarkan rayuan dengan kos dibayar oleh responden-responden berjumlah RM10,000 di sini dan ke bawah tertakluk kepada alokatur, dan mengenepikan perintah mahkamah sesyen:

(1) Tuan tanah tidak boleh memohon writ distres ex parte untuk kenaikan sewa yang tidak dipersetujui oleh penyewa. Jika tuan tanah menaikkan sewa dan penyewa enggan bersetuju, satu-satunya remedi yang tersedia kepada tuan tanah ialah, selepas memberi penyewa notis yang sewajarnya untuk keluar, untuk menyamannya bagi mendapatkan pemilikan kosong tetapi dia tidak berhak untuk merampas sewa yang dinaikkan tersebut (lihat perenggan 8–9).

(2) Tuan tanah dalam writ distres ex parte tidak boleh memohon perintah mahkamah untuk mengunci premis penyewa. Hak sedemikian tidak diperuntukkan di bawah ss 5 dan 7 Akta Distres 1951. Ia juga tidak diperuntukkan di bawah Borang 186 A 75 k 3 Kaedah-Kaedah Mahkamah 2012 (lihat perenggan 11–12).]

Cases referred to

Dr Mathew Sebastian v Metroplex Leasing & Credit Corp Sdn Bhd [1996] 5 MLJ 558, HC (distd)

Selvarani a/p KV Velusamy v Sundara Raju a/l Kasamoorthie [1999] MLJU 223; [1999] 6 CLJ 477, HC (refd)

Wong Choon For v Lim Chee Hooi & Ors [2002] 5 MLJ 252; [2002] 5 CLJ 556, HC (refd)

Legislation referred to

Distress Act 1951 ss 5, 7

Rules of Court 2012 O 75 r 3, Form 186

Phang Soon Mun (with Tang Kian Khuang) (Han & Partners) for the appellant.
Annie Varghese (with Jayasri Nadarajan) (Hakeem Arabi & Assoc) for the respondent.

Leong Wai Hong JC:

INTRODUCTION

[1] At first blush, the facts in this appeal before me looked complicated. However, when the court used the Socratic method of questioning, the facts became crystal clear.

[2] The legal issues are simpler. They are:

(a) can a landlord apply for an ex parte writ of distress for an increased rent not agreed to by a tenant? and

(b) can a landlord in an ex parte writ of distress apply for a court order to lock up the tenant's premises?

BACKGROUND FACTS

[3] The first appellant AR Lahore Enterprise is a tenant of the respondents Sungei Wang Plaza Sdn Bhd and Sungei Wang Holdings Sdn Bhd. The second appellant is her husband.

[4] The rent was RM30,000 per month. The respondents unilaterally increased the rent to RM69,026.46 per month which was not agreed to by the first appellant (see encl 15 para 607 respondents' letter dated 23 November 2021).

[5] The first appellant failed to pay the rent to the respondents.

THE COURT PROCEEDINGS

[6] The respondents applied to the sessions court and obtained an ex parte distress order based on a purported outstanding rental of RM720,262.60 based on the alleged increased rent of RM69,026.46 per month. The respondents also obtained an order to lock the premises.

[7] The appellants applied to set aside the distress. The sessions court dismissed the application. I allowed the appeal on 16 August 2023 with costs. These are my grounds of judgment.

Can a landlord apply for an ex parte writ of distress for an increased rent not agreed to by a tenant?

[8] The answer is no.

[9] In my view, a landlord cannot apply for an ex parte writ of distress for an increased rent not agreed to by a tenant. If a landlord raised the rent and the tenant declined to agree, the only remedy open to the landlord is, after giving the tenant a proper notice to quit, to sue him for vacant possession but he had no right to distrain for his increased rent.

(See *Wong Choon For v Lim Chee Hooi & Ors* [2002] 5 MLJ 252; [2002] 5 CLJ 556 Ramli Ali JC.)

[10] In *Wong Choon For v Lim Chee Hooi & Ors* [2002] 5 MLJ 252; [2002] 5 CLJ 556, Ramli Ali JC said:

> In the circumstances, it is obvious that *the new rental of RM1,500 per month with effect from January 2000 was unilaterally fixed by the respondents (as the landlord)*. It was not even effectively communicated to the appellant. The appellant had no knowledge about it. *Thus, the appellant had never agreed to the said new rental.* In fact, the appellant had not been to the first respondent's office to discuss about the new rental as required by the first respondent vide his letter dated 3 December 1999 to the appellant. Therefore, I can safely conclude that there is no new tenancy agreement. *In order to* support a claim for such increased rental or to *justify the distress therefor, the respondents must show that the tenant (the appellant) had agreed to pay such increased rental* or facts from which such assent on the part of the appellant might be inferred by the court.
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> In *Jenaboo & Anor v Vytilingum* (1885) 4 Ky 78, Wood J in dealing with the issue of increased rental to justify the issue of a writ of distress, has said: ... that *there was no power in a landlord to increase his tenant's rent by a notice, and unless there was an agreement by the tenant to pay such increased rent, or there were such facts in the case, as by his conduct or otherwise, from which the court could infer an assent on his part, he could not be made liable therefor; that if a landlord considered he should get more rent and the tenant declined to pay it, the only remedy open to the landlord was, after giving the tenant a proper notice to quit, to sue him in action of ejectment; but he had no right to distrain for his increased rent. That to entitle a landlord to destrain there must be an agreement to pay rent, and that for a fixed and definite amount.*
>
> In that case, the distress was declared to be irregular and improper and was discharged on the ground that the rent at RM5 per month was not agreed to and the amount of the rent that should be paid per month was a matter in dispute between the landlord and the tenant. (Emphasis added.)

Can a landlord in an ex parte writ of distress apply for a court order to lock up the tenant's premises?

[11] The answer is also no.

[12] A landlord in an ex parte writ of distress cannot apply for a court order to lock up the tenant's premises. Such a right is not provided under ss 5 and 7 of the Distress Act. It is also not provided for under Form 186 of O 75 r 3 of the Rules of Court 2012. See also 75/3/1 *Malaysian Civil Procedure 2021* (Vol 1, Sweet & Maxwell).

[13] In *Selvarani a/p KV Velusamy v Sundara Raju a/l Kasamoorthie* [1999] MLJU 223; [1999] 6 CLJ 477 (HC), Chin Fook Yen J also said at para 486:

> ... *premises were locked up in the course of the execution, thus preventing the right of entry. Such acts, if proven, are unlawful* and the court certainly cannot condone them. *However, they are not basis for setting aside the writ of distress unless the writ itself was defective* and that is not the case here. *The complaint here is that in the process of execution the authority had been exceeded resulting in an unlawful execution*. Inasmuch as the writ was concerned there was nothing unlawful. I am of opinion *the remedy is by instituting or commencing an action for damages for wrongful distress*. It has been held in the case of *Chop Chye Hin Chong v Ng Yeok Seng* [1934] SSR (Vol III) 265, before the Supreme Court Appellate Civil Jurisdiction ... (Emphasis added.)

[14] *Dr Mathew Sebastian v Metroplex Leasing & Credit Corp Sdn Bhd* [1996] 5 MLJ 558 at 562H is a case on wrongful execution of a writ of sale and seizure on the premises by the bailiff. The premises were sealed off and locked up by the bailiff. This is thus not a writ of distress case, but it is instructive how the court treats a wrongful execution.

[15] KC Vohrah J held that the bailiff was acting on the instructions of the defendant to lock up the premises and the defendant is liable for trespass.

DECISION

[16] I allow the appeal with costs. The order of the sessions court is set aside. The respondents to pay costs of RM10,000 here and below subject to allocatur.

Appeal allowed with costs to be paid by respondents amounting to RM10,000 here and below subject to allocatur; order of sessions court set aside.

Reported by Dzulqarnain Ab Fatar